IN THE

Supreme Court of the United States

OCTOBER TERM, 1976
No.

WILLIAM DAVIS MARTIN,

Petitioner,

76-1363

-against-

W. GRAHAM CLAYTOR ~~JOHN W. WARNER~~, Secretary of the Navy and ADMIRAL D.W. COOPER, Chief of the Naval Reserves, Department of the Navy,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976
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JOHN W. WARNER, Secretary of the Navy and ADMIRAL D.W. COOPER, Chief of the Naval Reserves, Department of the Navy,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

OPINIONS BELOW

The Petitioner prays that a writ

of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit dated and filed March 8, 1977, which judgment affirmed the opinion of Judge Platt, USDJ, United States District Court for the Eastern District of New York, made and entered September 21, 1976. A copy of the Judgment of the Court of Appeals appears at A-2; a copy of the opinion of Judge Platt, 419 F.Supp. 133, appears at A-5 in the appendix hereto.

JURISDICTION

The grounds on which the jurisdiction of this Court is invoked are:

The date of the judgment or decree sought to be reviewed is March 8,

1977, which judgment was entered March 8, 1977; there was no extension of time within which to petition for certiorari nor was a rehearing below had. Jurisdiction of this court is invoked by virtue of 28 U.S.C. 1254(1) and Rule 19b of this Court in that the Court of Appeals has decided an important federal question which has not been, but should be, decided by this Court.

QUESTIONS PRESENTED

Does the Secretary of the Navy have authority to remove from a promotion list a selectee who has been nominated by the President with the advice and consent of the Senate to be promoted to the rank of Captain, USNR?

If the Secretary of the Navy removes such selectee without knowledge or decision by the President, is that tantamount to an affirmative determination by the President to remove said selectee from the promotion list?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions and statutes which the case involves are as follows, and the texts thereof are set forth in the appendix:

United States Constitution, Art. II, Sec. 2

10 USC 5912

10 USC 5902(d)

10 USC 5905(a)

STATEMENT OF THE CASE

Petitioner, a Commander, USNR, was nominated by the President with advice and consent of the Senate pursuant to 10 USC 5912 to be promoted to CAPTAIN, USNR. While on the promotion list awaiting his promotion he is alleged to have engaged in an act of misconduct and was thereafter delayed in his promotion by the Secretary of the Navy pursuant to 10 USC 5902(d) pending an investigation of the incident; thereafter on November 12, 1974 the Secretary of the Navy, acting for the President, removed petitioner from the list, and no commission was ever signed or delivered to petitioner. The facts of the case are set forth in the opinion of Platt, USDJ, at A-5.

Additional facts not included in the opinion but which were before the District Court by way of interrogatories revealed that the President was not informed of the incident nor did he provide any input into the determination to remove petitioner from the list. Pertinent texts of the interrogatories and answers thereto are set forth at A-17. Petitioner's contention was and is that the Secretary of the Navy did not have authority to exercise Presidential authority in removing him from the list and that since any valid delay in promotion was over when the investigation ceased, he was entitled to assume the rank of Captain unless the President determined otherwise.

BASIS OF FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

Jurisdiction was conferred upon the District Court by virtue of 28 USC 1331(a), 1361 and 2201 in that Mandamus and related relief against officers of the United States who were alleged to not be performing duties owed to the petitioner was sought together with request for declaratory judgment, mandamus and possible back pay.

REASONS FOR GRANTING THE WRIT

The Writ of Certiorari should be allowed pursuant to Rule 19 of this Court in that the Second Circuit Court of Appeals rendered a decision dealing with an important question of federal law which

has not been, but should be, settled by this Court. The question deals with the vesting provision of Art. II Sec. 2 cl 2 of the United States Constitution, respecting the power of appointment of public officers. The Court of Appeals relied on Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), and D'Arco v. U.S., 441 F.2d 1173 (Ct. Cl. 1971). Marbury is not controlling in petitioner's opinion in that the President of the United States in Marbury made the presidential decision not to appoint the candidate for office after the nomination and advice and consent of the senate and knew of the decision not to appoint. In petitioner's case, the purely presidential decision

was made by the Secretary of the Navy and the President neither knew of the incident nor provided any input into the determination to remove petitioner from the promotion list. Pursuant to Art. II Sec. 2 Cl. 2 of the United States Constitution, Congress may by law vest certain appointments in the President alone or in the Head of a Department. With regard to Captains in the Navy, Congress expressed the requirement that such appointments be by the President with the advice and consent of the Senate pursuant to 10 USC 5912. In removal from the list of selectees nominated with the advice and consent of the President, Congress vested the Secretary of the Navy with a strictly limited power to delay, but only during

a period of investigation, the promotion of such officer. 10 USC 5902(d). The power to remove such selectee was specifically vested in the President and not in the Secretary of the Navy. 10 USC 5905(a). When the investigation in petitioner's case ended, any valid delay on the part of the Secretary ceased and petitioner was entitled to promotion. The District Court held that the Secretary of the Navy had no expressed or implied power to take presidential action respecting the appointment power of these sections, a conclusion which was left undisturbed by the Court of Appeals. The District Court held, however, that since no commission was ever signed or delivered, this was tantamount to an affirma-

tive action by the President removing petitioner from the promotion list. It should be noted that the power of the President to remove involves Presidential discretion. The President "may" remove the name. 10 USC 5905(a). He need not remove the name of a selectee and hence the removal is not purely ministerial but involved a conscious decision by the President. This is the congressional intent of the statutes involved, and is particularly important in the military in that the President is Commander in Chief of the Armed Services.

Petitioner does recognize that there are many instances wherein a head of a department may act for the President when the statute gives the President

the power to perform some act. Thus a head of a department can act for the President on such matters as disposal of government land, raising of interest rates and a host of other decisions which are to be made by the President by statute. But these actions do not concern themselves with the appointment power of United States Constitution Art. II Sec. 2 cl. 2. In the instant case any interpretation of 10 USC 5905(a) which would vest the Secretary of the Navy with the power to remove would be not only violative of that section but would be unconstitutional as violative of the vesting provision of the appointment petition of Art. II. The Courts below recognized this point. Yet the only affirmative

act depriving petitioner of his captaincy is the unconstitutional removal by the Secretary of the Navy from the promotion list. The Secretary of the Navy prepares and signs the commissions of the various promotees. He refused to do this in petitioner's case citing his alleged removal from the list. As pointed out, the President made no such decision. Petitioner was entitled to Presidential consideration as to whether or not he should be promoted. He was entitled to Presidential compassion or lack of compassion in the case. Congress mandated that such decision be a Presidential decision and no such Presidential decision was made.

Petitioner recognizes that there

is no obligation in the part of the President to promote petitioner, but there is an obligation by statute that the President make a decision of Presidential calibre whether or not petitioner should or should not be promoted. The Secretary, by his action, deprived the petitioner of his promotion and deprived the President of the opportunity to make the determination required by law as to whether or not the petitioner should be promoted. Respondents should be directed to lay before the President for Presidential determination, whether or not petitioner should be promoted.

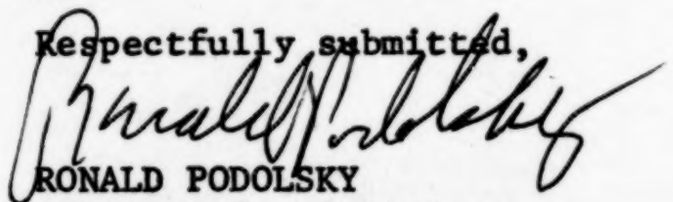
What makes this case so important from a national point of view and which compels granting of the writ is the fact

that the case points out that there are cabinet, sub-cabinet and high level staff officers making Presidential decisions without authority of law. Such practice by these officials can be misdirected so as to embarrass a President, and in a nuclear age could have catastrophic effect.

CONCLUSION

The application for a Writ of Certiorari should be granted.

Respectfully submitted,



RONALD PODOLSKY
Attorney for Petitioner

APPENDIX

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S CONSTITUTION ART II Sec. 2

[cl. 2] He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

[3] 10 U.S.C. § 5912: "Permanent and temporary appointments under this chapter in grades above lieutenant-commander in the Naval Reserve and in grades above major in the Marine Corps Reserve shall be made by the President, by and with the advice and consent of the Senate. All other permanent and temporary appointments under this chapter shall be made by the President alone."

[5] 10 U.S.C. § 5902(d): "The promotion of an officer of the Naval Reserve or the Marine Corps Reserve who is under investigation or against whom proceedings of a court-martial or a board of officers are pending may be delayed by the Secretary of the Navy until the investigation or proceedings are completed. However, the promotion of an officer may not be delayed under this subsection for more than one year after the date he is selected for promotion unless the Secretary determines that a further delay is necessary in the public interest."

[6] 10 U.S.C. § 5905(a): "The President may remove the name of any reserve officer from a promotional list established under this chapter."

ORDER OF COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 8th day of March, one thousand nine hundred and seventy-seven.

Present:
Hon. Robert P. Anderson,
Hon. James L. Oakes,
Hon. Murray I. Gurfein,
Circuit Judges

William Davis Martin,
Plaintiff-Appellant,

v. 76-6158

John W. Warner, Secretary of the Navy, and Admiral D. W. Cooper, Chief of the Naval Reserve, Department of the Navy,
Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the order of the district court is affirmed on so much of the opinion of Judge Platt as relates to the lack of any obligation on the part of the President to appoint appellant to the rank of Captain, Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803); D'Arco v. United States, 441 F.2d 1173, 1175 (Ct. Cl. 1971); 10 U.S.C. §§5596(h), 5777(a), 5779, 5902 and 5905(a). We need express no opinion on the issue whether the President impliedly or presumedly

delegated his 10 U.S.C. § 5905(a) authority to remove appellant's name from a promotion list to the Secretary of the Navy by virtue of 3 U.S.C. §§ 301 and 302.

/s/ Robert P. Anderson
ROBERT P. ANDERSON

/s/ James L. Oakes
JAMES L. OAKES

/s/ Murray I. Gurfein
MURRAY I. GURFEIN,
U. S. Circuit Judges

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
FILED
MAR 8 1977
A. DANIEL FUSARO, CLERK

ORDER OF PLATT, J.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - - - - x

WILLIAM DAVIS MARTIN,

Plaintiff,

-against-

JOHN W. WARNER, Secretary of the Navy and Admiral D. W. Cooper, Chief of the Naval Reserves, Department of the Navy,

Defendants.

- - - - - - - - - - - - - - - - x

MEMORANDUM AND ORDER

September 21, 1976

PLATT, D.J.

To put it mildly, this is somewhat of a unique case which is now before this Court for the second time. The Court's first opinion is reported at 377 F.Supp. 1039 (E.D.N.Y. June 18, 1974).

At this juncture, plaintiff moves,

pursuant to Rule 56 of the Federal Rules of Civil Procedure, for an order granting summary judgment on his amended complaint which seeks a judgment directing that he be promoted to the rank of Captain, USNR, retroactively to July 1, 1974, including incidental benefits such as loss of pay and pension differential between the ranks of Commander and Captain, etc. Defendants, under the same Rule, cross move also for summary judgment. The facts are not really in dispute. They are as follows:

On February 12, 1974, defendant Warner, pursuant to 10 U.S.C. § 5895, furnished to a Selection Board convened under 10 U.S.C. § 5893 the name and record of the plaintiff as one who was eligible for consideration for promotion by

the Board to the rank of Captain in the United States Naval Reserve.

Pursuant to § 5897 of Title 10 of the United States Code the Selection Board apparently recommended the plaintiff for promotion and pursuant to § 5898 of such Title, the report of such Board then should "be submitted to the President for his approval or disapproval."

The government concedes that plaintiff's promotion was approved, and pursuant to § 5912 of such Title and § 2 of Article II of the United States Constitution plaintiff's appointment was submitted to the United States Senate to comply with the requirement that appointments in grades above Captain in the Naval Reserve "shall be made by the

President, by and with the advice and consent of the Senate". On April 24, 1974 the United States Senate confirmed a temporary appointment to the rank of Captain for the plaintiff.

On May 3, 1974, plaintiff is alleged to have "streaked" through the Belmont Hotel ballroom in New York City in the presence of a group of fellow Naval Reservists and their ladies, all of whom were in civilian clothes at a U.S. Naval Reserve dance at that hotel.

The Chief of Naval Reserves ordered an investigation of the incident. Plaintiff unsuccessfully sought to restrain this investigation in this Court (377 F. Supp. 1039) and in the Court of Appeals (aff'd without opinion).

By memorandum dated June 28, 1974 the Secretary of the Navy "approved" a request of Bureau of Personnel "that the Chief of Naval Personnel be authorized to take no action with regard to temporary promotion of the plaintiff to Captain pending resolution of his alleged misconduct" as authorized by 10 U.S.C. § 5902(d), as amended.

On July 1, 1974, plaintiff's "running mates" on the Captains' list assumed the rank of Captain, United States Naval Reserve, but defendants claim plaintiff did not.

Following the investigation the Chief of Naval Reserve found "that this matter cannot be resolved satisfactorily by court martial" and said that he

"considers that subject officer by his conduct is no longer qualified to remain on active duty * * * It is therefore recommended that this matter be brought to the attention of the Secretary of the Navy requesting that he be released from active duty and if eligible be given the opportunity to retire but that retirement be in the grade of Commander". (Memorandum from Chief of Naval Reserve to Judge Advocate General, July 15, 1974.)

On November 12, 1974, the Secretary of the Navy "approved" a memorandum for him from the Bureau of Naval Personnel recommending that he "acting for the President," remove Commander Martin's name from the promotion list.

By the Secretary's "approval" of

such memorandum defendants maintain that the President removed plaintiff's name from the promotion list in accordance with Title 10 United States Code § 5905(a).

The Secretary, however, seems to have no such power under 10 U.S.C. § 5905(a). He only appears to have the power under 10 U.S.C. § 5092(d), as amended, to delay the promotion of an officer who was under an investigation, etc.

The defendant argues that such power may be presumed to have been delegated to the Secretary. 3 U.S.C. § 302. However, under 3 U.S.C. § 301, by Executive Orders Nos. 10621, 10661 and 11390 the President has expressly delegated certain of his prescribed authority under

Title 10 of the United States Code (see e.g., Title 10 U.S.C. §§ 7291, 5083, 5133, etc., and West's Supplementary Pamphlet 1927-1975 for 3 U.S.C.A. at 394, 397, 398, 402) but has not so delegated his authority under Section 5905(a) of such Title. This would clearly seem to indicate that the Secretary had no such "implied delegated authority" and that neither Congress nor the President had made any such delegation expressly or by implication.

This does not, however, defeat the defendants' case because in the last analysis plaintiff's position really is that following the completion of the investigation by the Secretary, the President has failed to complete his appoint-

ment (after Senate confirmation) "by failing to prepare or sign the commission". D'Arco v. United States, 194 Ct. Cl. 811, 816 (1971); Marbury v. Madison, 1 Cranch (5 U.S.) 137 (1803).

It is indisputable that the plaintiff was selected for promotion to the "temporary" rank of Captain. Such a promotion is terminable at any time (see 10 U.S.C. § 5596(h), 5779) or revocable at will by the President.

Thus there is not even a possible argument that the President had any obligation to complete the plaintiff's appointment by preparing and signing his commission (cf: Marbury v. Madison, 1 Cranch (5 U.S.) 137 (1803)), and his failure to do so in this instance may be

said to be the equivalent of, or tantamount to, an affirmative removal by him of plaintiff's name from the promotion list under 10 U.S.C. 5905(a).

Viewed in this light, and for such reasons, plaintiff's motion for summary judgment must be denied and defendants cross-motion therefor must be granted.

SO ORDERED.

/s/ Thomas C. Platt
U.S.D.J.

F I L E D
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D. N.Y.
SEP 22 1976

JUDGMENT APPEALED FROM

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x

WILLIAM DAVID MARTIN,

Plaintiff,

- against - JUDGMENT

JOHN W. WARNER, Secretary of the Navy and Admiral D.W. Cooper, Chief of the Naval Reserves, Department of Navy, 74 C 814

Defendants.

----------x

A memorandum and order of Honorable Thomas C. Platt, United States District Judge, having been filed on September 22, 1976, denying plaintiff's motion for summary judgment and granting defendants' cross-motion for summary judgment, it is

ORDERED AND ADJUDGED that plaintiff take nothing of the defendants and that plaintiff's motion for summary judgment is denied and defendants' cross-motion for summary judgment is granted.

Dated: Brooklyn, New York
September 22, 1976

/s/ Lewis Orgel
Clerk

SELECTED ANSWERS TO INTERROGATORIES

* * *

INTERROGATORY NO. 5. Was the plaintiff removed from the list for cause, which cause was made known to the President of the United States prior to plaintiff's removal from the list? If so, set forth all complete copies of any document which informed the President of the United States of any cause for which plaintiff's standing on the list should be considered for the purpose of Presidential action and include the date and full and complete copies of any acknowledgements of receipt by the President of the United States of said documents informing him of the incident of concern.

ANSWER. Yes, see answer to Interroga-

tory No. 3, supra. The President of the United States was not personally advised of the Secretary's action prior to plaintiff's removal from the list.

INTERROGATORY NO. 6. Did the President of the United States have knowledge of the incident which formed the cause of removal of the plaintiff.

ANSWER. The President was not personally notified of this incident by officials in the Department of the Navy.

* * *

INTERROGATORY NO. 26. Did the President of the United States provide any input whatsoever into the determination to remove the plaintiff from the list? If so on what dates did he act and set forth all documents and memoranda signed by him

or by his direction. If not personally signed by him, set forth any documentary evidence indicating that the documents be signed by direction.

ANSWER. No.

* * *

No. 76-1363

In the Supreme Court of the United States

OCTOBER TERM, 1976

WILLIAM DAVIS MARTIN, PETITIONER

v.

W. GRAHAM CLAYTOR, JR.,
SECRETARY OF THE NAVY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1363

WILLIAM DAVIS MARTIN, PETITIONER

v.

W. GRAHAM CLAYTOR, JR.,
SECRETARY OF THE NAVY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

Petitioner contends that he is entitled to promotion to the temporary rank of Captain, United States Naval Reserve, because his name was removed from the promotion list by the Secretary of the Navy rather than by the President personally.

Under the statutory scheme for promotions in the Naval Reserve, a candidate recommended by a selection board for promotion to either temporary or permanent ranks is placed on a promotion list. 10 U.S.C. 5902. If he is a candidate for the rank of Captain or higher, he is then nominated by the President for promotion and his name is submitted to the Senate for confirmation. 10 U.S.C. 5912. If confirmed, his promotion to the higher rank is completed when the President signs and issues his commission. *D'Arco* v. *United States*, 441 F. 2d 1173 (Ct. Cl.).

Petitioner, a Commander in the Naval Reserve, was placed on a promotion list, nominated by the President for promotion to the temporary rank of Captain, and confirmed by the Senate on April 24, 1974 (Pet. App. A-6 to A-8). However, on May 3, 1974, before his commission was signed or issued, he allegedly "streaked" through the ballroom of the Belmont Hotel in New York City, where a U.S. Naval Reserve dance was in progress (*id.* at A-8). The Chief of Naval Reserves ordered an investigation, which petitioner unsuccessfully sought to restrain. *Martin* v. *Warner*, 377 F. Supp. 1039 (E.D. N.Y.), affirmed, C.A. 2, No. 74-1881, January 21, 1975. On June 28, 1974, the Secretary of the Navy, pursuant to 10 U.S.C. 5902(d), authorized the Chief of Naval Personnel to "'take no action with regard to temporary promotion of [petitioner] pending resolution of his alleged misconduct'" (Pet. App. A-9).

As a result of the investigation, the Chief of Naval Reserves concluded that petitioner was not qualified to remain on active duty and, if eligible, should be given the opportunity to retire at the grade of Commander (Pet. App. A-10). On November 12, 1974, the Secretary of the Navy approved a memorandum from the Bureau of Naval Personnel recommending that the Secretary, "acting for the President" pursuant to 10 U.S.C. 5905(a), remove petitioner's name from the promotion list (Pet. App. A-10 to A-11).

Petitioner then brought this action in the United States District Court for the Eastern District of New York, seeking an order that he be promoted to Captain, USNR, retroactive to July 1, 1974 (Pet. App. A-6). The district court dismissed the complaint, holding that the President had no obligation to complete petitioner's appointment by preparing and signing his commission and that the President's failure to do so was tantamount to removal of petitioner's name from the promotion list pursuant to 10

U.S.C. 5905(a) (Pet. App. A-5 to A-14). The court of appeals affirmed (Pet. App. A-2 to A-4).

Petitioner contends here that while 10 U.S.C. 5902(d) authorizes the Secretary of the Navy to delay promotions pending the resolution of proceedings against a candidate, only the President is authorized by statute (10 U.S.C. 5905 (a)) to remove a candidate from a promotion list. Even if that contention were true, it does not avail petitioner's claim to a promotion, since, as the courts below correctly concluded, the President has no obligation to complete petitioner's promotion, and accordingly petitioner has no legal claim to that promotion. *D'Arco* v. *United States*, *supra*. Cf. *Marbury* v. *Madison*, 1 Cranch 137.

In any event, the Secretary has implied authority to act for the President in removing candidates from promotion lists. Delegation of Presidential functions to an agency head need not "require express authorization in any case in which such an official would be presumed in law to have acted by authority or direction of the President." 3 U.S.C. 302. The Secretary's removal of petitioner's name from the promotion list was such a case. See *Brownfield* v. *United States*, 148 Ct. Cl. 411, 416-417; *D'Arco* v. *United States*, *supra*.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

JUNE 1977.

DOJ-1977-06

IN THE

Supreme Court of the United States

October Term, 1976
No. 76-1363

WILLIAM DAVIS MARTIN,

Petitioner,

v.

W. GRAHAM CLAYTOR, JR.,
SECRETARY OF THE NAVY, ET AL.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY MEMORANDUM OF PETITIONER

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(6368)

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1976
No. 76-1363

WILLIAM DAVIS MARTIN,

Petitioner,

v.

W. GRAHAM CLAYTOR, JR., SECRETARY OF THE NAVY, ET AL.,

Respondents.

REPLY MEMORANDUM
OF PETITIONER

POINT I

THE PRESIDENT MANIFESTED NO INTENTION NOT TO PROMOTE PETITIONER

The sections of law and constitutional provisions cited in the Petition indicate beyond

argument that Congress intended that a decision of Presidential calibre be made by the President specifically to the exclusion of the head of a department, particularly as relates to the appointment power. It was also pointed out that the Secretary prepares and signs commissions for the President, and gave as his reason for not promoting Petitioner the alleged removal from the promotion list. Moreover, in the brief of the government in the Court of Appeals, there is the following confirmation that the President does not sign and prepare commissions:

> The fact that the Senate had already confirmed appellant's temporary appointment and that the Secretary, acting for the President, customarily prepares and signs commissions, is irrelevant. The determinative facts are that the President, either acting alone or through the Secretary, did not prepare and issue a commission to appellant and that appellant retired at the rank of commander, having never assumed the rank of captain.

See also the Affidavit of Col. Smith, record on appeal, in opposition to the motion for

summary judgment.

Although the President does not have any obligation to appoint the petitioner, he does by constitutional and statutory provisions alluded to in the Petition have the duty to make a Presidential decision which was not done in this case. As cited in the Petition, the President was never informed of the incident. Respondents should be directed to lay before the President for Presidential decision whether or not the petitioner should be promoted.

In response to any argument that the President is too busy or should not be bothered with such a decision, it is observed that the statutes and constitutional provisions specifically vest that decision in the President and not in the head of the department. If the President was unwilling to retain such Presidential power, he could well have vetoed the

legislation making the decision a Presidential one. His signing of the legislation indicated that such decision was not too burdensome for the President to make, and indicated his endorsement of the legislative will expressed in the statutes.

CONCLUSION

The Petition should be granted.

Respectfully submitted,

Ronald Podolsky

RONALD PODOLSKY
Attorney for Petitioner